Filed 10/15/12 P. v. Baltazar CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SURGIO VALENCIA BALTAZAR,

Defendant and Appellant.

F062476

(Super. Ct. No. MF49001)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. Marc A. Garcia, Judge.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Gomes, J. and Detjen, J.

After using a firearm in the commission of two carjackings, Surgio Valencia Baltazar falsely identified himself to the arresting officer and admitted possession of the firearm.[1] A jury found him guilty of two counts of carjacking, two counts of felon in possession of a firearm, and one count of false identification to a peace officer. The jury found the firearm allegation in each carjacking count true. On appeal, he challenges the proof of his felony prior at trial and the calculation of his fees at sentencing. We order the correction of two fees but otherwise we affirm the judgment.

BACKGROUND

On November 7, 2008, an information charged Baltazar with two counts of carjacking (counts 1 & 3; Pen. Code, § 215, subd. (a)),[2] one on June 30, 2008, the other on July 3, 2008; with two counts of felon in possession of a firearm (counts 2 & 4; former § 12021, subd. (a)(1)), one on June 30, 2008, the other on July 3, 2008; and with one count of false identification to a peace officer (§ 148.9, subd. (a)) on July 3, 2008. The information alleged his personal use of a firearm in the commission of both carjackings. (§ 12022.53, subds. (a)(5), (b).)

On January 15, 2009, the jury found Baltazar guilty as charged and found both firearm allegations true. At his probation and sentencing hearing on March 20, 2009, the court issued a bench warrant for his arrest due to his escape from jail. On May 9, 2011, after he was back in custody, he received an aggregate sentence of 18 years:[3]

- On count 1, the mitigated term of three years for carjacking (§ 215, subd. (b)) plus the statutory term of 10 years for the firearm enhancement (§ 12022.53, subd. (b));

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[1] Additional facts, as relevant, are in the discussion (*post*).

[2] Later statutory references are to the Penal Code unless otherwise noted.

[3] In three other cases (Super. Ct. Nos. CRM015874, SUF29682, and SUF29697, respectively), the court imposed an additional aggregate term of four years four months for the escape, to which he pled no contest, and for probation violations in two receiving stolen property cases.

• On count 2, a concurrent midterm of two years for felon in possession (former §§ 18, 12021, subd. (a)(1));

• On count 3, a consecutive term of one year eight months (one-third the midterm) for carjacking (§ 215, subd. (b)) plus a term of three years four months (one-third the statutory term) for the firearm enhancement (§ 12022.53, subd. (b));

• On count 4, a concurrent midterm of two years for felon in possession (former §§ 18, 12021, subd. (a)(1)); and

• On count 5, a concurrent term of six months for false identification to a peace officer (§§ 19, 148.9, subd. (a)).

DISCUSSION

1. Proof of Felony Prior

Baltazar argues that an insufficiency of the evidence of felon in possession is in the record. The Attorney General argues that an accurate characterization of the issue Baltazar raises is not insufficiency of the evidence but court error, that he forfeited his right to judicial review by his failure to object and, alternatively, that he invited error by agreeing to judicial notice and by objecting to the sole instruction that would have put that issue before the jury.

At an off-the-record colloquy, the prosecutor put the case numbers of Baltazar's receiving stolen property priors on the record and stated, "At the appropriate time, we'll ask for judicial notice." Baltazar's attorney inquired, "Well, Your Honor, in connection with the judicial notice, what does the court intend?," and clarified his query by stating, "I need to know what statement the jury would hear." The court responded , "Exactly," and asked the prosecutor, "What exactly are you going to introduce?" The prosecutor replied, "Your Honor, we'll ask the court to take judicial notice that he was convicted of a felony, 496(a), on October 18, 2005. That's it." Baltazar's attorney said, "That's fine.

I can live with that statement." The court stated, "Yeah, that's fine. All right," and began the evidentiary phase of the trial.

At an instructional colloquy after both parties rested, Baltazar's attorney made reference to CALCRIM No. 3100 ("Prior Conviction: Non-Bifurcated Trial") and stated, "I'm going to make an objection later when [Baltazar] comes in. That's the priors." He opined that the instruction applied not to "a prior conviction situation" but rather to "a prison prior, the one-year enhancement, the five-year enhancement and the strike priors and priors that –," at which point the court interjected, stating that the instruction "says you must decide whether the evidence proved whether the defendant was convicted of the alleged crimes" and that "there is not another prior conviction instruction, but I agree that there are – that this doesn't exactly fit."

The prosecutor argued, "[CALCRIM No.] 2510 [("Possession of Firearm by Person Prohibited")] includes convicted of a felony, and that's the only other instruction that even has any reference to previous convictions. If [Baltazar's attorney] is willing to live with 2510 and get rid of 3100, we're okay with it, but I don't see any alternative that is included in [the pattern instructions]." Baltazar's attorney stated, "I agree to that. You have to give 2510." The court observed, "Yes, but 2510 is just the generic instruction on that the defendant has previously been convicted of a felony, and I believe that the jury, or that the defendant is entitled to have that issue decided by the jury. Don't you think so?" Baltazar's attorney replied, "Correct."

"So if you – so if you – if the jury has to decide whether, in fact, he has been convicted of a felony," the court stated, "you have to give some version of 3100, which is basically the instruction about whether that [*sic*] it is their responsibility to find out whether he's been convicted of a felony. I admit that the first part of the introduction [*sic*] is not exactly –," and Baltazar's attorney interjected, "Right. It –," and the court continued, "It doesn't exactly fit, but I don't – but it's the only one that covers a prior conviction for the jury. It's the only one that does that. This is right out of CalCrim."

Baltazar's attorney argued, "Your Honor, here's what I think is revealing, and that's in the title where it says non-bifurcated trial. If you remember last Tuesday you called us up and asked, you know, whether or not we're going to bifurcate, and I just agreed we can't. You know, this is not a bifurcation situation." The court stated, "I agree with that. No, you can't." Baltazar's attorney continued, "It's an element of the crime, and that was presented to you by both sides, and I just think this has to do with priors. And, in fact, the whole issue of, you know, where it talks about the court has already determined the defendant is the person –," to which the court interjected, "Yes." Baltazar's attorney added, "I don't think that that applies because that certainly applies to prior convictions when you're talking about does he have a strike." The court responded, "You are right, and there's a bunch of case law on that. You are right."

The prosecutor opined, "Your Honor, I agree that CalCrim 3100 originally had been intended for the use of priors." The court stated, "Well, yes, that's exactly right. It doesn't really fit the situation." The prosecutor commented, "To my knowledge, there's no – there's no authority to suggest that the court cannot include this. However, that being said, we're okay with getting rid of it." The court mused, "I'm not sure I should, though. That's the problem. Because the jury must decide as part of the elements of this crime whether he has, in fact, suffered that conviction. Don't you think?"

The prosecutor replied, "That's true, Your Honor. I think, however, 2510 covers that. Defendant had previously been convicted of a felony. Those are common [*sic*] used words." Baltazar's attorney replied, "Uh-huh. Yeah." The court inquired of Baltazar's attorney if he would "agree that 3100, because it doesn't really fit the situation, shouldn't be given?," to which he replied, "Shouldn't be given at all." The court stated, "Should not be given, and you agree that you would 1ive with it not being given?," to which the prosecutor responded, "We'll live with it." The court stated, "All right. It will go out." The prosecutor added, "That's fine, Your Honor."

On the issue of judicial notice, the record shows a brief colloquy afterward about whether the court should allow the prosecutor to reopen his case-in-chief on the issue of Baltazar's felony prior. Baltazar's attorney commented, "Your Honor, I appreciate the court's already considering that it's going to allow [the prosecutor] to reopen to bring in the prior." The court stated, "Yes." Baltazar's attorney continued, "For the record, we're objecting. We presented – you know, we opened, we called a witness, we presented evidence, we rested, and this is not in rebuttal to anything that we presented, and we just don't think the court should, at this time, grant leave to allow it to reopen." The court replied, "I understand your objection." The prosecutor argued, "Your Honor, for the record, this is more in the nature of introduction of evidence rather than testimony. The jury can decide what to do with it because we will only be asking for the court to take judicial notice of its own files and we'll offer no testimony on it." The court stated that, even though the prosecutor, "technically speaking," had "rested," his omission was "an honest oversight," not an attempt "to take advantage." On that ground, the court ruled, as an exercise of judicial discretion, that the prosecutor could reopen.

In the presence of the jury, the prosecutor requested that the court "take judicial notice of its own court file" that Baltazar "was convicted on October 18th of 2005 of receiving stolen property, a violation of Section 496(a) of the Penal Code, a felony." The court granted his request and instructed the jury with, inter alia, CALCRIM No. 2510 on the crime of felon in possession.[4] In argument to the jury, the prosecutor noted that he had "asked that the judge take judicial notice of the fact" that on "October 18, 2005, [Baltazar] was convicted of a felony, receiving stolen property. You'll receive that

[4] The court instructed, "The defendant is charged in Counts 2 and 4 with unlawfully possessing a firearm. To prove that the defendant is guilty of this crime, the People must prove…that, one, the defendant possessed a firearm. Two, the defendant knew that he possessed the firearm. And three, the defendant had previously been convicted of a felony."

judicial notice. You should take it as fact. If the judge," he concluded, "finds something, takes judicial notice of it, you must consider it as if it were proved." On both counts of felon in possession, the jury found Baltazar guilty.

In briefing here, the parties draw opposing inferences from the record. Informed of the prosecutor's intent to make a later request for "judicial notice that [Baltazar] was convicted of a felony, 496(a), on October 18, 2005," his attorney replied, "That's fine. I can live with that statement." The Attorney General argues that the dialogue shows "an agreement [that] was tantamount to a stipulation to an evidentiary fact." Baltazar argues that the dialogue shows that his attorney "was saying that he could 'live with' a judicial notice request that did not include too much extraneous detail," not "that he could 'live with' judicial notice of the ultimate fact of the conviction." He asserts that the court's later observation that "the jury must decide as part of the elements of this crime whether he has, in fact, suffered that conviction" is inconsistent with the understanding "that the question of the felony conviction was to be conclusively determined via judicial notice." Likewise, he contends that the prosecutor's later comment that "the jury can decide what to do with it because we will only be asking for the court to take judicial notice of its own files" is inconsistent with the notion that "judicial notice was to conclusively determine the existence of the felony conviction."

The decision whether to reopen a criminal matter for the admission of additional evidence is within the broad discretion of the court. (*People v. Jones* (2012) 54 Cal.4th 1, 66.) The Penal Code codifies not only the order of proceedings in a criminal trial "unless otherwise directed by the court" (§ 1093) but also the exception that, "for good reasons, and in the sound discretion of the court, the order prescribed in Section 1093 may be departed from" (§ 1094).

At his arraignment, Baltazar learned that his felony prior was at issue. "On October 18, 2005, in violation of section 496(a) of the California Penal Code," the information alleged, he was "duly and legally convicted of a felony, to wit: receiving

stolen property." Once both parties had rested, the prosecutor asked for permission to reopen on the issue of the felony prior. Characterizing the prosecutor's omission as "an honest oversight," not an attempt "to take advantage," the court granted his request. "It shall be the duty of the judge to control all proceedings during the trial," the Legislature has decreed, "with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) The rule that a court has "broad discretion to order a case reopened and allow the introduction of additional evidence" is "well settled." (*People v. Goss* (1992) 7 Cal.App.4th 702, 706.) "If the judge does not discover that a matter should be judicially noticed until after the cause is submitted for decision, he [or she] may, of course, order the cause to be reopened for the purpose of permitting the parties to provide him [or her] with information concerning the matter." (Law Rev. Comm. comment to Evid. Code, § 455, subd. (a).) The court has the statutory authority to take judicial notice of its own records. (Evid. Code, § 452, subd. (d)(1).) The record fails to persuade us that Baltazar's attorney's agreement to judicial notice or objection to CALCRIM No. 3100 had any effect on the court's exercise of that authority.

"'No error results from granting a request to reopen in the absence of a showing of abuse.'" (*People v. Riley* (2010) 185 Cal.App.4th 754, 764.) As the record persuades us that the court's order granting the request to reopen was not an abuse of discretion, there was, as a matter of state law, no error. Baltazar argues that the court's order was a denial of due process, but the premise of his constitutional claim is that the court's order was error, so his due process claim likewise fails. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3.)[5]

[5] Our holding moots the Attorney General's argument that Baltazar forfeited his right to judicial review by his failure to object.

2. Calculation of Fees

Baltazar argues, the Attorney General agrees, and we concur that errors in the calculation of two fees at sentencing require correction. First, Baltazar suffered six criminal convictions since January 1, 2009, the effective date of Government Code section 70373, which authorizes the imposition of an assessment of $30 each, for a total of $180, but the abstract of judgment incorrectly shows a total of $240. (See *People v. Cortez* (2010) 189 Cal.App.4th 1436, 1443; *People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001.) Second, he suffered seven criminal convictions while Penal Code section 1465.8 authorized the imposition of a fee of $20 each, for a total of $140, and one more while the statute authorized the imposition of a fee of $40 each, for a grand total of $180, but the abstract of judgment incorrectly shows a grand total of $320. (See *People v. Alford* (2007) 42 Cal.4th 749, 754.) We order correction of the calculation of both fees.

DISPOSITION

The matter is remanded to superior court with directions (1) to impose a total Government Code section 70373 assessment of $180 instead of $240, (2) to impose a total Penal Code section 1465.8 fee of $180 instead of $320, (3) to so amend the abstract of judgment, and (4) to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. Baltazar has no right to be present at those proceedings. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1234-1235.) In all other respects, the judgment is affirmed.